UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NANCY H. GRAAK, Plaintiff, v. JO ANNE B. BARNHART, Commissioner Social Security Administration, Defendant.	Case No. CV06-0368-JPD ORDER

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff Nancy Graak appeals the final decision of the Commissioner of the Social Security Administration (the "Commissioner") denying her application for disability insurance benefits ("DIB") under Title II of the Social Security Act (the "Act") after a hearing before an administrative law judge ("ALJ"). For the reasons set forth below, the Court ORDERS that the ALJ's decision be reversed and the case remanded for further administrative proceedings.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a 46-year-old woman with a college education. AR 811. She worked continuously from 1988 until July 2001. AR 71. In her most recent job, plaintiff worked for approximately eight years as an office assistant for Pierce County. *Id.* Plaintiff previously worked in a clerical capacity at an animal shelter for four years. *Id.* She also worked briefly as a layout artist for a newspaper. *Id.*

On August 5, 2002, plaintiff applied for DIB. AR 60-62. Plaintiff alleges that she became unable to work on August 1, 2001, as a result of multiple conditions including chronic fatigue syndrome ("CFS"), fibromyalgia, chronic sinusitis, hypothyroidism, and depression. AR 70. Her application was denied initially and upon reconsideration. AR 31-34, 38-41. Plaintiff requested a hearing to appeal the denial of her claim. AR 42.

An ALJ held a hearing to review plaintiff's application and on March 25, 2005, issued a decision denying benefits. AR 17-26. Among other things, the ALJ found that plaintiff retained the residual functional capacity ("RFC") to perform a "significant range of light work," and that there were a "significant number of jobs in the national economy" that plaintiff could perform, such as work as "a routine office clerk." AR 26. The ALJ concluded that plaintiff was not disabled for purposes of the Act. *Id.* The Appeals Council denied plaintiff's request for review, making the ALJ's March 25, 2005, decision the Commissioner's final decision for purposes of judicial review. AR 6-8. Plaintiff timely filed this civil action appealing the ALJ's decision. Dkt. No. 1.

III. JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g). The parties have consented to have this case heard by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13. Dkt. No. 10.

IV. STANDARD OF REVIEW

A reviewing court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or are not supported by substantial evidence in the record as a whole. *See* 42 U.S.C. 405(g); *see, e.g., Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as "more than a mere scintilla but less than a preponderance." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (citations and quotations omitted). It is "such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *Id.* "The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (citation omitted). "Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld." *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citation omitted).

V. EVALUATING DISABILITY

As the claimant, Ms. Graak bears the burden of proving that she is disabled within the meaning of the Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months[.]" 42 U.S.C. § 423(d)(1)(A). A claimant is disabled only if her impairments are of such severity that she is not only unable to do her previous work, but cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. *See* 42 U.S.C. § 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). In addition, a claimant applying for DIB must show that she was covered by the social security disability insurance program at the time of the injury's onset or occurrence. *See* 42 U.S.C. §§ 416(i)(3), 423(c)(1); 20 C.F.R. § 404.130(b).

The Social Security regulations set out a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. § 404.1520. At step 1, the claimant must establish that she is not engaging in any substantial gainful activity. 20 C.F.R. § 404.1520(b). If the claimant establishes that she has not engaged in any substantial gainful activity during the relevant time period, the Commissioner proceeds to step 2. At step 2, the claimant must establish that she has one or more medically severe impairments, or combination of impairments, that limit her physical or mental ability to do basic

work activities. 20 C.F.R. § 404.1520(c). If the claimant does not have such impairments, she is not disabled. *Id.* If the claimant's impairment is severe, the Commissioner moves to step 3 to determine whether the impairment meets or equals any of the listed impairments described in the regulations. 20 C.F.R. § 404.1520(d). A claimant who meets or equals one of the listings for the requisite twelve-month duration is disabled. *Id.*

When the claimant's impairment neither meets nor equals one of the impairments listed in the regulations, the Commissioner must proceed to step 4 and evaluate the claimant's RFC. 20 C.F.R. § 404.1520(e). Here, the Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether the claimant can still perform that work. *Id.* If the claimant is not able to perform her past relevant work, the burden shifts to the Commissioner at step 5 to show that the claimant can perform some other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. § 404.1520(f); *Tackett*, 180 F.3d at 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

VI. DECISION BELOW

On March 25, 2005, the ALJ issued a decision denying plaintiff's request for benefits and made the following findings:

1. The claimant meets the nondisability requirements for a period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through the date of this decision.

2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.

3. The claimant's dysthymia, somatic disorder not otherwise specified, a personality disorder, musculoskeletal disorder, and chronic fatigue syndrome/fibromyalgia are considered "severe" based on the requirements in the Regulations 20 CFR § 404.1520(c).

4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P,

Regulation No. 4.

5. The undersigned finds the claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.

6. The claimant has the following residual functional capacity: she has the ability to lift and carry 20 pounds occasionally and 10 pounds frequently. She can sit, stand, and walk for a total of 6 hours in an 8-hour workday and sit for 6 hours in a workday. She would have no limitations with regard to pushing or pulling. The claimant has the ability to understand, remember, and carry out simple instructions; make simple work-related decisions necessary to function in unskilled work; respond appropriately to supervisors, coworkers, and usual work situations and deal with changes in a routine work setting.

7. The claimant is unable to perform any of her past relevant work (20 CFR § 404.1565).

8. The claimant is a "younger individual" (20 CFR § 404.1563).

9. The claimant has "more than a high school (or high school equivalent) education" (20 CFR § 404.1564).

10. The claimant has no transferable skills from any past relevant work and/or transferability of skills is not an issue in this case (20 CFR § 404.1568).

11. The claimant has the residual functional capacity to perform a significant range of light work (20 CFR § 404.1567).

12. Although the claimant's exertional limitations do not allow her to perform the full range of light work, using the Medical-Vocational Rule 202.21 as a framework for decision-making, there are a significant number of jobs in the national economy that she could perform. Examples of such jobs include work as a routine office clerk (DOT #209.562-010).

13. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR § 404.1520(g)).

AR 25-26.

VII. ISSUES ON APPEAL

Plaintiff raises the following issues on appeal:

A. Did the ALJ erroneously reject or ignore the supportive opinions of plaintiff's treating doctors?

B. Did the ALJ improperly determine that plaintiff was not credible?

C. Did the ALJ give a hypothetical to the vocational expert that failed to accurately reflect all of plaintiff's limitations?

D. Did the ALJ err by rejecting testimony of lay witnesses?

VIII. DISCUSSION

A. The ALJ Erred By Rejecting or Ignoring the Opinions of Plaintiff's Treating Physicians Without Giving Specific and Legitimate Reasons for Doing So.

Plaintiff argues that the ALJ erred by failing to accord proper weight to the favorable opinions of her treating doctors. Dkt. No. 11 at 6. The Commissioner asserts that the ALJ gave specific and legitimate reasons for rejecting certain opinions and, therefore, that the ALJ's treatment of the medical testimony was adequate. Dkt. No. 13 at 7.

Because treating physicians are "employed to cure and [have] a greater opportunity to know and observe the patient as an individual," their opinions are given greater weight than the opinions of other physicians. *Rodriguez v. Bowen*, 876 F.2d 759, 761 (9th Cir. 1989) (citations omitted). A treating physician's opinion, however, is not necessarily conclusive as to either a physical condition or the ultimate issue of disability; and an ALJ may disregard a treating physician's opinion whether or not that opinion is contradicted by other medical evidence. *Id.* at 761-62 & n.7; *Magallanes*, 881 F.2d at 751.

A treating physician's opinion that has not been contradicted by another physician, however, may be rejected only for "clear and convincing" reasons supported by substantial evidence in the record. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). This requires that the ALJ provide a "detailed and thorough summary of the facts and conflicting clinical evidence" and explain his interpretations and findings based thereon. *Id.* at 725 (citation omitted). Mere conclusions are not enough. *Id.* Similarly, an ALJ must defer to a treating physician's opinion, even when controverted by other medical opinions, unless the ALJ provides "specific, legitimate reasons for doing so that are based on substantial evidence in

the record." *See Andrews*, 53 F.3d at 1041 (citations omitted), *see also Magallanes*, 881 F.3d at 751.

1. Dr. Ranheim's Opinion

Dr. Phillip Ranheim is one of plaintiff's treating physicians. Dr. Ranheim first saw plaintiff in 2002 and treated her regularly through March 2003.[1] AR 464-69, 506-07, 598-99. During that time period, he noted that plaintiff suffered from multiple illnesses and conditions including: chronic illness associated with exposure to molds, "ongoing chronic fatigue syndrome," nutritional deficiencies, chronic sinusitis, fibromyalgia, and depression. *Id.* Dr. Ranheim saw plaintiff in December 2004 to examine her in connection with her DIB application. Upon the request of plaintiff's attorney, Dr. Ranheim wrote a letter in which he opined that plaintiff "is unable to perform usual work-related activities and should qualify for Social Security disability benefits based upon fibromyalgia syndrome and CFS." AR 604.

The ALJ did not credit Dr. Ranheim's opinion regarding plaintiff's disability. AR 21. He determined that Dr. Ranheim's opinion was entitled to "less weight" because the doctor had "given up his non-biased position" and was acting as an "advocate" for plaintiff. *Id.* This conclusion was apparently based upon the letter Dr. Ranheim had written to plaintiff's attorney. The ALJ also concluded that Dr. Ranheim based his opinion on plaintiff's self-reported symptoms from one appointment, which was scheduled for "litigation purposes." *Id.* Further, the ALJ noted that the limitations Dr. Ranheim assessed were not consistent with his treatment notes.

Dr. Ranheim was plaintiff's treating physician and his opinion, regarding the extent of plaintiff's disability, was contradicted by other medical-expert testimony. *See*, *e.g.*, AR 488-93. Thus, the ALJ was obligated to either credit Dr. Ranheim's opinions, or to provide specific and legitimate reasons, based on substantial evidence in the record, for rejecting

[1]The ALJ's opinion makes no mention of Dr. Ranheim's evaluations of plaintiff from 2002. AR 21.

them. For the reasons set forth below, the ALJ failed to meet this standard.

a. The ALJ's determination, that Dr. Ranheim was acting as an advocate for the plaintiff, is not supported by the record.

The ALJ's opinion and the Commissioner's brief both cite, *Matney v. Sullivan*, 981 F.2d 1016, 1019-20 (9th Cir. 1992), in support of the proposition that ALJs are entitled to reject doctors' opinions that cross the line into the realm of advocacy. AR 21; Dkt. No. 13 at 8. The doctor's opinion at issue in *Matney* is distinguishable from that of Dr. Ranheim. In *Matney*, the doctor had examined the claimant one time and had "*agreed* to become an advocate and assist in presenting a meaningful petition for Social Security benefits." *Matney*, 981 F.2d at 1019 (emphasis added). In contrast, Dr. Ranheim treated plaintiff several times over the course of approximately two and a half years. AR 468, 603. Additionally, there is no evidence that Dr. Ranheim "agreed" to act as an advocate for plaintiff. To the contrary, Dr. Ranheim's letter contains numerous observations that tend to indicate the neutrality of his opinion. AR 603-04 ("[plaintiff] is able to sit for prolonged periods of time," "[plaintiff's] ability to hear and speak is fair," "[plaintiff] is able to reason, make decisions, perform routine tasks, and interact with others," "[o]n the other hand, [plaintiff's] ability to sustain concentration she reports as poor").

"An examining doctor's findings are entitled to no less weight when the examination is procured by the claimant than when it is obtained by the Commissioner . . . [t]he Secretary may not assume that doctors routinely lie in order to help their patients collect disability benefits." *Lester v. Chater*, 81 F.3d 821, 832 (9th Cir. 1995) (citation and quotation omitted); *see also Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) (noting that source of patient's referral was improper basis for assessing doctor's credibility, where doctor's opinion was based on an examination of claimant, where there was no inconsistency between his report and his treating notes, and where there was no evidence of any actual improprieties or evidence that doctor was attempting to mislead the ALJ). Dr. Ranheim wrote a letter summarizing his

findings and concluded that plaintiff was unable to work. AR 603. There is nothing improper about a doctor providing a letter documenting and summarizing a patient's medical status. In short, the record does not demonstrate any bias on the part of Dr. Ranheim and the ALJ is not permitted to infer that such bias existed simply because the doctor's opinion was procured by plaintiff's attorney. *Nguyen*, 100 F.3d at 1465. The asserted advocacy is not a legitimate basis to reject or discredit Dr. Ranheim's opinion.

b. The ALJ mischaracterized Dr. Ranheim's basis for his opinion regarding plaintiff's disability.

The ALJ also noted that Dr. Ranheim "based his opinion on [plaintiff's] self-report during this one visit in December 2004, which was scheduled for litigation purposes." AR 21. This conclusion is not supported by the record. Although Dr. Ranheim undoubtedly did rely on plaintiff's self-reporting of her symptoms, he also conducted a physical examination. AR 604. For example, Dr. Ranheim wrote that "[o]n examination, the patient was alert" and that "[t]here were 12 tender points noticed over the typical . . . distribution." *Id.* Additionally, Dr. Ranheim had treated and examined the plaintiff on several prior occasions and, although not explicitly stated, it is reasonable to assume that he also relied, at least in part, on these previous assessments in rendering his opinion. *See Lester*, 81 F.3d at 833 (noting that the "treating physician's continuing relationship with the claimant makes him especially qualified to . . . form an overall conclusion as to functional capacities and limitations, as well as to prescribe or approve the overall course of treatment").

The Court also notes that it is common and accepted practice for a doctor to base his diagnosis of CFS on the self-reported symptoms of his patient and the ruling out of other possible illnesses. *See Reddick*, 157 F.3d at 726 (noting that the Centers for Disease Control defines CFS as "self-reported persistent or relapsing fatigue lasting six or more consecutive months" and that "the presence of persistent fatigue is *necessarily self-reported*") (emphasis added). Therefore, the ALJ is not permitted to reject the opinion of Dr. Ranheim on the

premise that it was based in-part on plaintiff's subjective complaints.

c. The ALJ's conclusion that Dr. Ranheim's assessment of plaintiff was not consistent with his treatment notes failed to take into account the waxing and waning nature of CFS.

The ALJ stated that "the limitations [Dr. Ranheim] imposed are not consistent with his treatment notes." AR 21. In support of this determination, the ALJ cites three examples of plaintiff's relatively favorable reports to Dr. Ranheim. *Id.* The ALJ does not specifically explain how these notations undermined Dr. Ranheim's opinion that plaintiff was unable to perform "usual work-related activities." AR 64. When read in its entirety, Dr. Ranheim's opinion does not suggest that plaintiff is entirely unable to function; rather, he notes that plaintiff's symptoms render her unable to function productively for more than a "severely limited" period of time. *Id.* This inability to function on a sustained basis is consistent with a diagnosis of CFS. *See Reddick*, 157 F.3d at 722 (holding that periods of sporadic activities punctuated with a need to rest are not inconsistent with CFS, which is characterized by periods of exacerbation and remission) (internal citation omitted); *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (noting that "[m]any home activities are not easily transferable to . . . the more grueling environment of the workplace, where it might be impossible to periodically rest or take medication").

The ALJ's reasons for rejecting the opinion of Dr. Ranheim are not based on legitimate reasons supported by the record. On remand, the ALJ is directed to evaluate the testimony of Dr. Ranheim.

2. Dr. Preston's Opinion

Myra Preston, Ph.D., evaluated plaintiff in December 2001 and administered a quantitative electroencephalogram ("QEEG"), a tool for mapping and analyzing brainwave activity. AR 386-89. She opined that the results of the QEEG correlated with the CFS symptoms that plaintiff reported. AR 387-88. She also opined that "Ms. Graak is not capable

of performing the duties essential to the functions of her occupation. She is not suitable to be trained for other duties due to her cognitive dysfunction." AR 388.

The ALJ gave "no significant weight" to Dr. Preston's findings. AR 19. He rejected the results of Dr. Preston's testing because "[the QEEG] has not been commonly recognized as a diagnostic tool throughout the medical community to evaluate cognitive responses related to chronic fatigue (SSR 99-2p), nor has the American College of Rheumatology (ACR) reported the use of this as a measure to evaluate cognitive response in connection with fibromyalgia." AR 19.

Plaintiff argues that the ALJ did not use the proper legal test for accepting or rejecting diagnostic testing for CFS, and further, that the QEEG test meets the standard promulgated by the Social Security Administration ("SSA") for diagnosing CFS. Dkt. No. 11 at 8-9. The Commissioner contends that the ALJ's rejection of Dr. Preston's evidence was proper because the opinion was based on unproven methods. Dkt. No. 13 at 8.

Social Security Ruling 99-2p lists several medical signs and laboratory findings that may be used to establish the existence of a medically determinable impairment in individuals with CFS. SSR 99-2p at *3. It states that: "[t]he existence of CFS may be documented with medical signs or laboratory findings other than those listed [here], provided that such documentation is *consistent with medically accepted clinical practice and is consistent with the other evidence in the case record*." *Id*. at *2-3 (emphasis added). Thus, the SSA does not mandate that a diagnostic tool for CFS be "commonly recognized . . . throughout the medical community." The SSA only requires that the medical findings be "consistent with medically accepted clinical practice" and "consistent with the other evidence in the case record." *Id*.

Dr. Preston was a treating physician and her opinions were contradicted by other medical-expert testimony. *See*, *e.g.*, AR 488-93. The ALJ was therefore obligated to either credit Dr. Preston's opinions, or to provide specific and legitimate reasons, for rejecting them. The ALJ did not meet this burden. An ALJ is required to do more than make conclusory

statements. *See Embrey v. Bowen*, 849 F.2d 418, 421 (9th Cir. 1988). The ALJ "must set forth his own interpretations and explain why they, rather than the doctors', are correct." *Id.* at 421-22. Here, the ALJ reached a conclusory determination that Dr. Preston's opinion, supported by a QEEG analysis, was not entitled to significant weight. Dr. Preston is a neurophysiologist with specialties in neuroscience and physiological psychology. AR 386. The ALJ was supplied with a medical-literature review that documents support for the use of QEEG evaluations. AR 605-83. The ALJ did not cite any authority or make any findings to explain why Dr. Preston's evaluation of the plaintiff was not consistent with medically accepted clinical practice. Additionally, because the ALJ did not believe that the QEEG had been commonly accepted by the medical community, he rejected Dr. Preston's entire opinion and evaluation. However, Dr. Preston's opinions were not confined to merely reporting the results of the QEEG analysis. Instead, she also reported that:

> [T]he findings . . . clinically correlate with [plaintiff's] responses to the Multiple Symptom Questionnaire. These symptoms include poor memory, confusion, concentration difficulties, slow processing speed, difficulty in making decisions, trouble with calculating, wide mood swings, depression, physical fatigue and sluggishness, motivational fatigue, restlessness, irregular heartbeat, rapid heartbeat and other autonomic dysfunction, sleep disorder and immune dysfunction.

AR 388.

On remand, the ALJ is directed to evaluate Dr. Preston's opinion in its entirety, and to re-evaluate Dr. Preston's testimony regarding the QEEG test in light of the "medically accepted clinical practice" standard outlined in SSR 99-2p.

3. Dr. Lidren

Donna Lidren, Ph.D., was plaintiff's treating psychologist. AR 391-407. In August 2001, Dr. Lidren noted that plaintiff suffered from fibromyalgia and CFS, and that plaintiff met the criteria for major depression, dysthymia, and generalized anxiety disorder. AR 404. Dr. Lidren also opined that plaintiff "may no longer be able to maintain work on a consistent level." *Id.* The ALJ's decision either ignored, implicitly rejected, or failed to consider Dr.

Lidren's testimony. On remand, the ALJ should properly evaluate Dr. Lidren's opinions.

4. Dr. Ahmad

The administrative record includes medical records from Dr. Naila Ahmad, who examined plaintiff in January 2005. AR 766. She conducted a physical examination of plaintiff and noted that she had a number of symptoms consistent with CFS, including "18 of 18 tender points." AR 767. Plaintiff argues that the ALJ ignored the testimony of Dr. Ahmad without analysis. Dkt. 11 at 9. The Commissioner argues that the ALJ had no obligation to reject Dr. Ahmad's testimony because she "did not find disability and was not listed as a doctor." Dkt. 13 at 8.

Dr. Ahmad's opinion, at least with regard to the tender points, appears to be uncontradicted. As with treating physicians, the uncontradicted opinions of an examining physician may not be rejected without clear and convincing reasons. *Lester*, 81 F.3d at 830. It is true that plaintiff did not list Dr. Ahmad as a doctor in the "Disability Report" form that she initially filled out for the SSA. This is likely because that form was prepared in 2002, and plaintiff's appointment with Dr. Ahmad was not until 2005. AR 69-95, 78. However, the "List of Exhibits" in the table of contents of the administrative record contains the heading, "Medical report from Naila Ahmad, MD dated 1/18/05," and lists the correct corresponding page numbers. AR 4. Dr. Ahmad's treatment notes show that she conducted an interview with plaintiff, performed a physical examination, and rendered an assessment. AR 766-68. Dr. Ahmad's opinion was part of the record before the ALJ. AR 766-68. Therefore, the ALJ was obligated to consider that testimony. It was erroneous for the ALJ to simply ignore the examining doctor's opinion without mention. On remand, the ALJ should properly evaluate the testimony of Dr. Ahmad.

B. The ALJ Improperly Rejected Plaintiff's Own Testimony as Being Not Credible.

The ALJ determined that plaintiff was "not entirely credible on this record in that there are no objective findings to support the degree of limitations she has alleged." AR 23. He also noted that plaintiff stated that she suffered from migraines but that her medical records did not reflect any "workup" for that condition. *Id.* Lastly, the ALJ cited examples from the record of activities he found inconsistent with the level of impairment that plaintiff alleged. *Id.* Plaintiff argues that the ALJ erred by rejecting her testimony as not credible without making specific findings about what testimony he deemed to have undermined her credibility. Dkt. No. 11 at 10. Plaintiff further argues that the ALJ arbitrarily discredited her testimony about pain and related symptoms. *Id.* The Commissioner contends that the ALJ gave clear and convincing reasons for rejecting plaintiff's testimony. Dkt. No. 13 at 6.

When evaluating a claimant's credibility, the ALJ must specifically identify what testimony is not credible and what evidence undermines the claimant's complaints; general findings are insufficient. *Reddick*, 157 F.3d at 722 (citations omitted). The ALJ may consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which claimant complains. *Smolen*, 80 F.3d at 1284 (internal citations omitted).

1. The ALJ improperly discredited plaintiff's subjective symptom testimony.

According to the Commissioner's regulations, a determination of whether to accept a claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. § 404.1529; *Smolen*, 80 F.3d at 1281; SSR 96-7p. First, the ALJ must determine whether there is a medically determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. § 404.1529(b); *Smolen*, 80 F.3d at 1281-2; SSR 96-7p. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the

claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick*, 157 F.3d 715, 722 (9th Cir. 1998) (internal citations omitted). Absent affirmative evidence showing that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Reddick*, 157 F.3d at 722 (citation omitted). Here, there are no allegations that plaintiff was malingering, so the ALJ was required to provide clear and convincing reasons for rejecting her testimony. The ALJ, however, failed to meet this burden.

As stated above, once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit a claimant's testimony as to the severity of her symptoms solely because they are unsupported by objective medical evidence. That is precisely what occurred in this case. It is undisputed that plaintiff produced evidence of an underlying impairment. AR 25, findings 3-4. The ALJ found that plaintiff suffered from multiple medically determinable impairments, including CFS and fibromyalgia. *Id.* The ALJ's belief that there was a lack of objective evidence was an improper basis for discrediting plaintiff's testimony regarding the severity of her symptoms and the degree to which she was limited by them.

2. The record shows that plaintiff reported to her doctors that she suffered from migraines on several occasions.

The ALJ also stated that plaintiff testified that she suffers from headaches and takes medicine for migraines but that there was "no record of workup for this condition." AR 23. Although it is not clear precisely what the ALJ meant by the term "workup," the plaintiff's medical records demonstrate that she reported suffering from migraines and headaches numerous times. AR 237, 241, 349, 466, 468-69, 565. On at least one occasion, plaintiff told her doctor that she uses "XS tylenol" when she gets a migraine, and then takes "Imitrex" if it persists. AR 565. Therefore, plaintiff's testimony regarding the headaches and migraines is

supported by the medical evidence in the record. The ALJ erred by discrediting plaintiff's credibility on this basis.

3. The fact that plaintiff may have engaged in sporadic, increased levels of activity is not necessarily inconsistent with the nature of her alleged disability.

The ALJ noted that, on occasion, plaintiff had engaged in activities that were inconsistent with the limitations she had otherwise described. AR 23. It appears that the ALJ based this observation in large part on a report, dated February 2, 2004, from one of plaintiff's doctors, which included a note that plaintiff had been taking care of her stepchildren and had joined several craft and activity groups with her mother-in-law. AR 562. However, the only evidence the ALJ cited as proof of plaintiff's heightened level of activity, out of a record more than 800 pages, was a single report, based on a single conversation that plaintiff had during a medical appointment. AR 23, 562. Further, the ALJ does not point out that, during that same conversation, plaintiff stated that she felt "very tired," and that caring for her stepchildren had "been difficult but she is managing." AR 562. Additionally, plaintiff stated only that she had "joined" the activity groups; the ALJ cites no follow-up conversation to suggest plaintiff actually participated in these groups for any significant period of time. In fact, plaintiff's mother-in-law, Dena Graak, wrote a letter in the record in which she stated "[w]e tried a senior exercise class when I first moved here, but [plaintiff] could not tolerate it at all." AR 152. Thus, the record does not support the ALJ's conclusion that plaintiff engaged in activities that were inconsistent with the symptoms she reported.

Moreover, assuming that plaintiff did occasionally engage in the activities described, such behavior is not inconsistent with the nature of plaintiff's alleged disabilities, particularly CFS. Plaintiff testified, and her medical records indicate, that some days are much worse for her than others. AR 819-26, 464-69. This testimony is consistent with the characteristics of CFS. *See* SSR 99-2p at *1 (defining CFS as "a systemic disorder consisting of a complex of

symptoms that may vary in incidence, duration, and severity"); *see also Reddick*, 157 F.3d at 722. The fact that plaintiff occasionally has the capacity to watch her stepchildren, or even to join an activity group, does not mean she is capable of consistently performing in a stressful and structured work environment. 20 C.F.R. § 404, Subpt. P., App. 2, § 200.00(c) (defining RFC as "the maximum degree to which the individual retains the capacity for *sustained* . . . [work]") (emphasis added); *see also Lester*, 81 F.3d at 833 (noting that "[o]ccasional symptom-free periods are not inconsistent with disability").

The ALJ's justifications for rejecting plaintiff's testimony were insufficient. On remand, the ALJ should properly credit plaintiff's testimony, or provide clear and convincing reasons for rejecting it.

C. The ALJ Failed to Give an Accurate Hypothetical to the Vocational Expert.

Plaintiff argues that the ALJ committed reversible error by failing to submit a hypothetical to the vocational expert ("VE") that accurately reflected all of plaintiff's limitations. Dkt. No. 11 at 12. Additionally, plaintiff argues that the ALJ's opinion mischaracterizes the VE's testimony. Dkt. No. 14 at 7. In her brief, the Commissioner does not address the deficiencies with the hypothetical and the VE testimony raised by plaintiff.

After a claimant has demonstrated that she has a severe impairment that prevents her from doing her past relevant work, she has made a *prima facie* showing of disability. *Tackett*, 180 F.3d at 1100-01. The burden then shifts to the Commissioner at step 5 to demonstrate that, in light of the claimant's RFC, age, education, and work experience, she can perform other types of work that exist in "significant numbers" in the national economy. *Id.*; 20 C.F.R. § 404.1560(b)(3). The Commissioner may meet this burden by referencing the Medical-Vocational Guidelines (or the "Grids"), a matrix system that provides uniform conclusions about the availability of work for similarly situated persons, in light of their physical limitations. *See* 20 C.F.R. Part 404, Subpt. P, App. 2.

However, since the Grids are based solely on strength and exertional factors, they may not be used for a claimant who suffers from non-exertional limitations. *See* 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00(b). When the Grids fail to describe accurately a claimant's limitations, as they did in this case, the ALJ should use them only as a framework and should solicit the testimony of a VE. *Reddick*, 157 F.3d at 729; *Tackett*, 180 F.3d at 1101. The ALJ must provide the VE with an accurate and detailed description of all the claimant's physical and mental limitations that are supported by the record. *Thomas*, 278 F.3d. at 956; *Tackett*, 180 F.3d at 1101.

In this case, the ALJ properly employed the assistance of a VE at plaintiff's hearing. However, the ALJ's inquiries to the VE yielded practically indecipherable results. AR 827-33. There are two major problems with the VE-testimony on record. First, the ALJ never actually posed a hypothetical to the VE, complete or otherwise. When plaintiff's attorney asked the ALJ, "are you going to ask [the VE] a, a hypothetical?," the ALJ simply responded, "I don't have any questions. If you want to ask some more questions, you're welcome to. This is, this is your case." AR 831. Plaintiff's attorney then proceeded to ask the VE whether plaintiff was capable of performing any of her previous jobs, to which the VE responded "I do not believe she could return to any of those." AR 832. Thus, a hypothetical was never submitted to the ALJ.

This leads to the second problem regarding the VE's testimony. As mentioned, the VE testified that she believed that plaintiff could not return to any of her previously held jobs, which included work as a routine office clerk. AR 832, 71. Yet, the ALJ concluded that plaintiff retained the RFC to work as "a routine office clerk." AR 26, findings 7, 11, 12. The ALJ did not address the inconsistency between these findings and the VE's testimony. To the contrary, the ALJ's opinion stated:

> The vocational expert agreed that the claimant would be able to work as a routine office clerk (DOT #209.562-010) performed at the light level with an SVP 3. This level is borderline unskilled work. The vocational expert testified

> that an individual with the claimant's age, education, past relevant work experience and residual functional capacity as determined could perform this work with significant numbers of positions in the national economy. I accept the testimony of the vocational expert.

AR 25.

The record shows that the VE gave no such testimony. It appears that the ALJ relied heavily on a "Vocational Decision Worksheet" signed and prepared by a disability adjudicator, not a VE. AR 139. This bare-bones form contains no indication as to whether all of plaintiff's physical and mental limitations were considered in arriving at the determination that plaintiff is capable of doing other light, unskilled work. *Id*. It is clear from the transcript of the hearing that the VE was not given a hypothetical and that what little testimony the VE did give was misinterpreted and mischaracterized in the ALJ's opinion. On remand the ALJ is directed to present the VE with a hypothetical that fairly incorporates all of plaintiff's functional limitations that are supported by the record.

D. The ALJ Did Not Erroneously Reject the Testimony of Plaintiff's Lay Witnesses But Should Consider the Testimony of Plaintiff's Mother-in-law on Remand.

The record before the ALJ included testimony from three lay witnesses. William Graak, plaintiff's husband, and Melanie Stillman, plaintiff's friend and "carpooler," each filled out a "Daily Activities Questionnaire" documenting their impressions of plaintiff's day-to-day activities. AR 100-09. Dena Graak, plaintiff's mother-in-law, also wrote a letter in which she described her interactions and experiences with plaintiff. AR 152. Plaintiff argues that the ALJ rejected the lay-witness testimony without reason. Dkt. No. 11 at 13. The Commissioner argues that the ALJ did not reject the lay witnesses' statements, rather, he noted them and gave them some weight, except where they were inconsistent with other evidence in the record. Dkt. No. 13 at 9.

In order to determine whether a claimant has an impairment, an ALJ may consider lay-witness sources, such as testimony by friends and family members. 20 C.F.R. §

404.1513(d)(4). Lay-witness testimony as to a claimant's symptoms or as to how an impairment affects claimant's ability to work is competent evidence. 20 C.F.R. § 404.1513(e); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (citations omitted). Therefore, such testimony cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). If an ALJ wishes to discount the testimony of a lay witness, he must provide reasons germane to each witness and may not categorically discredit the testimony. *Lewis*, 236 F.3d at 511. Identifying inconsistencies between such statements and the record as a whole is sufficient. *Id.*

The ALJ acknowledged the testimony of Mr. Graak and Ms. Stillman. AR 23. He gave their testimony "some weight, but only to the extent that they support the findings established in this decision." *Id.* The ALJ then noted that the "[lay-witness] statements are inconsistent with the claimant's reports to various treating sources." *Id.* He gave examples of what he took to be inconsistencies between the plaintiff's testimony and that of the lay witnesses. *Id.* However, in light of the errors identified above regarding the evaluation of medical testimony, the ALJ is directed to reconsider these lay-witness statements. Moreover, the ALJ did not mention the letter from Dena Graak in his opinion. On remand, the ALJ should also consider the testimony of Ms. Dena Graak, or give germane reasons for disregarding it.

IX. CONCLUSION

For the reasons set forth in this order, this case is remanded for further administrative proceedings not inconsistent with this opinion. Upon remand the ALJ shall correct the deficiencies identified above, with emphasis on the following: (1) reevaluate the medical opinions of Dr. Ranheim and Dr. Preston; (2) evaluate the medical opinions of Dr. Lidren and Dr. Ahmad; (3) reevaluate the adverse-credibility determination of plaintiff; (4) provide the VE with a hypothetical that accurately reflects all of plaintiff's limitations; and (5) address the lay-witness testimony.

DATED this 6th day of September, 2006.

JAMES P. DONOHUE
United States Magistrate Judge